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No. 774

IN THE

Supreme Court of The United States

OCTOBER TERM, 1958

ELMO E. ALLEN, ET AL.,
Petitioners,

v.

THE COLUMBIA GAS SYSTEM, INC., ET AL.,
Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Edward D. Spilman

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Petitioners Allen Committee and Edward D. Spilman pray that this Court grant rehearing of its Order of April 27, 1959, denying the Petition for Writ of Certiorari filed March 14, 1959, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit in the above entitled case as prayed for in the original Petition.

Reasons for Granting Rehearing and Issuing the Writ

1. Since the order denying the Petition for Writ of Certiorari, the value of the debtors' assets has been determined conclusively to be $15,243,395 as opposed

to $10,538,800, the value used in the Plan sought to be reviewed. The $15,000,000 valuation is fixed by actual offers of solvent underwriters to underwrite the Reorganized Company with bonds and stock convertible to cash at the option of the stockholder in an amount which, when added to the debtors' assets, give that total.[1]

The new proposal fixing the $15,000,000 value must require revision of the present Plan. That Plan provides that the entire value of Inland after payment of the fixed dollar amounts allowed to American and Kentucky as quasi creditors of Inland will go to Columbia as a secured creditor of Inland. Under the present Plan and valuation of about $10,500.00, Columbia's secured claims will fall short of full payment by about $2,700,000[2]; but at the $15,000,000 valuation now established, the equity in Inland which Columbia will receive will be worth nearly $2,000,000 in excess of Columbia's entire claim against Inland. Surely the present Plan allowing to Columbia, as a creditor of Inland, assets worth more than its entire claim against Inland can not be consummated.

Since review of the present Plan must be had, the argument so forcefully made by Columbia and Williamson below and in opposition to the original Petition for Certiorari that the present Plan should be confirmed in order to reach an end of interminable litigation no longer has much force. The Plan must be reviewed here or in the District Court. If reviewed

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[1] The new proposal is printed as an appendix to this Petition and is separately presented. A concise summary is found in the introductory paragraphs, pp. 2 to 4 of the Appendix. Counsel for Petitioners did not receive this proposal until May 18, 1959.

[2] Exhibit A to Plan.

here, this Court can and doubtless will consider the whole structure of the Reorganization Plan which has now become thoroughly distorted by fictions and piecemeal extensions of the rule of subordination far beyond the situations to which they were first applied. Firm principles will be established for the guidance of the lower courts which will not be disturbed by successive increases in the value of the debtors' properties, to the end that no further question concerning controlling rules can arise.

On the other hand, if review is denied and the case allowed to go to the District Court to determine whether subordination and the quasi creditor fiction can be stretched further to accommodate the tremendous increase in realizable value of the debtors' assets, another round of hearings, appeals and petitions for certiorari is inevitable.

2. We did not point out in our original Petition what may be the most significant reason for the departure of the Court of Appeals from the accepted and usual course of bankruptcy proceedings. This could be that Columbia's status as a subordinated but not rejected creditor was fixed before minority stockholders were really represented in these proceedings and before the assets of the debtors were sufficient to give minority stockholders any reason to be represented.[3] After the debtors' assets had reached the

[3] Minority stockholders of Inland were not represented in 1945, when the Court of Appeals reversed its 1941 decision disallowing Columbia's claims. Nor were stockholders represented in 1951 when the quasi creditor concept placed their claims behind those of the public creditors of American and Kentucky. In 1954, when Kentucky creditors were awarded an "overage" in American assets after payment of American debts, these stockholders were not formally before the Court. They were allowed a part of the argument time of the American Trustee in the Court of Appeals. Since 1954, the Court of Appeals has consistently refused to measure stockholders' equities against Columbia's equities.

point that stockholders could reasonably expect to realize on their stock interests, the Court of Appeals resolutely refused to consider their equities with respect to Columbia's claims. S.E.C. has in the past and on petition here recognized this fact and urged consideration of stockholders' equities.[4]

3. Review here of the existing Plan is important in the administration of bankruptcy. Clearly settled principles established by this Court have been ignored below. *Pepper* v. *Litton*, 308 U.S. 295, held that creditor claims of a majority stockholder acquired by fraud will be rejected in bankruptcy. *Taylor v. Standard Gas & Electric Co.*, 306 U. S. 307, and other bankruptcy cases hold that corporate identity as between a parent and subsidiary will not be ignored in the absence of fraud or wrongdoing. The courts below have completely disregarded these fixed principles. Instead, the Court of Appeals has created the fiction that American and Kentucky public creditors are creditors of Inland—which of course they are not—and have held Columbia's equities superior to those of innocent minority stockholders. Exercise of the supervisory power of this Court is necessary to prevent departure from the accepted principles of these and other cases. This power has frequently been exercised and should be here. Perhaps the clearest example of this Court's supervision to fix the bankruptcy rule is found in the numerous decisions of this Court which were required to convince lower bankruptcy courts that the absolute priority rule rather than the relative priority rule should be followed. Cf. *Chicago, Rock Island & Pacific R. Co.* v. *Howard*, 7 Wall. 392;

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[4] Memorandum for Securities and Exchange Commission filed here, dated April, 1959.

Northern Pacific Railway Co. v. *Boyd*, 228 U.S. 482; *Case* v. *Los Angeles Lumber Products Co., Ltd.*, 308 U.S. 106; *Consolidated Rock Products Co.* v. *DuBois*, 312 U.S. 510; *Marine Harbor Properties, Inc.* v. *Manufacturer's Trust Co.*, 317 U.S. 78.

4. Two questions clearly raised here are of great practical importance in the administartion of bankruptcy law. The first is whether a bankruptcy court should be permitted to disregard settled principles established by this Court relating to subordination and priority by creation of unprecedented fictions; here the fiction that American and Kentucky public creditors are creditors of Inland. The second is whether, in the teeth of square findings by both courts below that American, the parent, has been guilty of no overreaching of its subsidiaries, Inland and Kentucky, and in the absence of any equitable ground, a bankruptcy court can properly ignore the corporate entities of parent and subsidiary corporations. These questions will of necessity frequently arise in reorganization proceedings. If the principles which are established here are permitted to stand as law, the rule of the chancellor's foot can supersede fixed principles of bankruptcy administration established by this Court.

5. Further, this Court has never directly passed on one question of bankruptcy law which is critical here. This is whether minority common stockholders' interests may be preferred in bankruptcy to creditor claims held by majority stockholders whose claims have been acquired and used to destroy the company in flagrant disregard of equitable rules. In *Taylor* v. *Standard Gas & Electric Co.*, supra, this Court held that preferred stockholders' interests are superior to such creditor claims of a majority stockholder. This

Court has never squarely held that the rule in *Taylor* extends to common stockholders although, as noted in our Reply Brief on the original petition, the opinion in *Pepper* v. *Litton*, supra, contains the clearest indication that the rule should be extended to common stockholders. This question should be settled. It will be in issue in all reorganization cases in which common stockholders claim inequitable conduct by creditors. There have been many in the past, and more are almost certain to follow.

Conclusion

For the reasons set forth above and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted, and that upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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May 22, 1959

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 38 of the rules of this Court.

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